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Supreme Court of the United States

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October Term, 1906, No. 63

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JAMES H. McKE

FREDERIC L. GRANT SHOE COMPANY,
Appellant,

against

W. M. LAIRD COMPANY
Appellee

BRIEF FOR APPELLEE

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Supreme Court of the United States.

OCTOBER TERM, 1905. NO. 318.

OCTOBER TERM, 1906. NO. 63.

FREDERICK L. GRANT SHOE COMPANY,
Appellant.

vs.

W. M. LAIRD COMPANY,
Appellee.

This is an appeal from a judgment of the United States District Court for the Western District of New York, which, on June 7th, 1905, adjudged the appellant a bankrupt.

BRIEF FOR APPELLEE.

On the 15th of July, 1903, the appellee, a corporation organized under the laws of the State of New Jersey having its principal place of business at Pittsburg, Pa. (Record page 2) filed in the office of the Clerk of the United States District Court for the Western District of New York its petition asking that the Frederick L. Grant Shoe Company (the appellant) a manufacturing corporation having its principal place of business at Rochester, New York (Record page 2) be adjudged a bankrupt.

The claim of the appellee arises from the following transactions and circumstances. On or about September 3rd, 1902, and between that date and May 22nd, 1903, the appellee purchased from the appellant, at various times and in various amounts, merchandise consisting of women's shoes, the said shoes to be manufactured by said Frederick L. Grant Shoe Company for the appellee in accordance with samples shown the appellee at the various times the orders therefor were given. The shoes were manufactured and delivered to the appellee, aggregating several thousand pairs. Upon receipt of the shoes from time to time the appellee paid the appellant the price agreed to be paid therefor, and all of the shoes so delivered were paid for in accordance with the terms upon which the same were purchased. Prior to the purchase of any of said shoes the appellant did, for a valuable consideration, and in consideration of the purchase by the appellee of said merchandise, expressly agree, guarantee and warrant that all shoes which they might thereafter manufacture for and sell to the appellee would be first class in every particular, both as to workmanship and materials, and would give perfect satisfaction; that such express warranty was made, and was part of the transaction upon each purchase of shoes; that of the amount purchased by the appellee 1864 pairs of women's high heeled shoes were defective both in material and workmanship; that the defects were latent, being undiscoverable on examination, the result of such defects being that the soles of the shoes cracked and split, the heel becomes loosened and comes off, the wooden foundation of the heel splits and breaks so that the shoes cannot be worn, and the appellee has suffered damage to the extent of $3,732.08 (Record page 3).

Upon the filing of such petition in the District Court a subpoena was duly issued, and on July 28th, 1903 the appellant filed in the office of the clerk of the District Court its answer (Record, pages 5, 6 and 7), whereby it denied the giving of the warranty and its breach.

The appellant then and there made a motion to dismiss the petition, which motion was denied (Amer. Bankruptcy Reports, Vol. 11. page 48 ; 125 Federal Rep., 576). Thereupon an appeal was taken from the order denying the motion to dismiss the appeal to the Circuit Court of Appeals for the Second Circuit, and upon such appeal the order of the District Court was affirmed (12 Amer. Bankruptcy Reports, 349; 130 Fed. Rep. 881).

On the 17th of May, 1905 the cause came on for trial before Hon. John R. Hazel, District Judge, and a jury, at a regular term of the United States District Court for the Western District of New York

held at the Government Building in the City of Rochester, New York (Record page 8). Upon the trial of the cause the fact of the insolvency of the appellant and the commission of an act of bankruptcy on the part of the appellant was then and there, in open court, admitted. No evidence was offered on the part of the appellant. Whereupon the Court proceeded, with the aid of the jury, to liquidate the claim of the petitioner, and the same was then and there liquidated at the sum of $3,454.00 (Record page 11). Whereupon the Court directed and adjudged that the appellant be declared and adjudged a bankrupt, and that the claim of the appellee be liquidated at the said sum of $3,454.00, and as so liquidated, allowed (Record page 12). Whereupon an appeal was taken to this court, and the only question to be argued upon this appeal is whether or not, under the circumstances of this case, the District Court had jurisdiction to entertain the petition in bankruptcy and proceed thereon.

ARGUMENT.

The appellant claims that the petitioning creditor herein had no provable claim because, at the time of the filing of the petition the claim was unliquidated and, as claimed by the appellant, disputed.

Just why so much stress is laid upon the fact that the claim is disputed, we do not see. Certainly the Bankruptcy Act does not provide that petitioning creditors must have undisputed claims. If that were so the involuntary features of the Bankruptcy Act would be useless. To defeat an involuntary bankruptcy proceeding, it would only be necessary for the alleged bankrupt to dispute the claim of the petitioning creditors. It would be a new doctrine indeed, to assert that a party only had standing in court whose claims were undisputed. If that rule were to prevail the labors of the courts would be very much lightened.

The real question is, then, whether an unliquidated claim, disputed or undisputed, is such a debt as may be made the foundation of involuntary bankruptcy proceedings.

Section 59b of the Act provides that three or more creditors who have provable claims against any person, etc., may file a petition. Section 63, under the caption "Debts which may be proved," specifies various classes of debts, among others, as follows:

"(4) Founded upon an open account or upon a contract, express or implied."

It will not be denied that the claim of W. M. Laird Co. is for a breach of an express contract of warranty.

Subsection b, of section 63, provides that unliquidated claims may be liquidated in such manner as the court shall direct and may thereafter be proved and allowed.

Our contention is that all claims of the classes specified in section 63a are "provable claims" within section 59b, whether liquidated or unliquidated, and that subsection b, of section 63, is intended merely to provide a way in which the amount of an unliquidated claim may be determined for the purpose of allowance.

The Act of 1867 also recognized that provable debts consisted of both liquidated and unliquidated claims. Section 19, entitled "of debts and proofs of claim," provided, "If any bankrupt shall be liable for unliquidated damages arising out of any contract or promise, or on account of any goods or chattels wrongfully taken, converted or withheld, the court may cause such damages to be assessed in such mode as it may deem best and the sum so assessed may be proved against the estate."

Section 63b gives the Bankruptcy Court the power to direct the liquidation of unliquidated claims. In order to apply to the court for such a direction for liquidation, a claimant must go into court in some proceeding and that proceeding must be in the matter of the alleged bankruptcy of the debtor, so that the very proceeding contemplated by this section of the act is the filing of a petition against the debtor and then applying to the court for the liquidation of the claim, and then, if established, the adjudication of the debtor would follow. Otherwise, the Bankruptcy Act would defeat the very purpose for which it was passed.

The Act, section 3b, provides: "A petition may be filed against a person who is insolvent and who committed an act of bankruptcy, within four months after the commission of such act." If a creditor with an unliquidated claim could not file a petition against a debtor until his claim was liquidated, then a debtor could commit an act of bankruptcy and by getting extensions of time, and through appeals, and on account of the condition of the calendars of our state courts, succeed in preventing a creditor from having a just claim liquidated within four months after such act of bankruptcy and thus prevent the creditor from ever filing a petition. It is plain that it was the intent of section 63b, by giving the bankruptcy courts the power to liquidate claims, to prevent the four months provision from working injustice.

Since this brief was prepared the attention of Counsel has been called to the case of Crawford v. Burke, 195 U. S. 176, which seems to be decisive of the question here presented. Followed in Tindle v. Birkett, 183 N. Y. 267.

This is the view of the statutes taken by the Circuit Court of Appeals as expressed by the opinion of Judge Townsend, in the case at bar, in which he says:

"To hold, as is contended by the alleged bankrupt, that the claim is not provable because the amount of the claim itself is not determinable, or its validity is disputed, would defeat the purpose of the involuntary provisions of the Bankrupt Act." (12 Amer. Bankruptcy Reports, page 350).

Some help may be had by examining the question from another point of view. Section 17 provides that a discharge in bankruptcy shall release a bankrupt from all of his "provable debts" with certain exceptions not here material. If the claim of the petitioning creditor were one of the "provable debts" from which the alleged bankrupt would be discharged, then it follows that its claim, though unliquidated, is a "provable claim" within section 59b. In *In re Hilton*, 4 Am. Bkr. Rep. 774, Brown, District Judge, says: "The principal question presented on this motion is whether an unliquidated claim that might have been liquidated and proved against the bankrupt, but which was voluntarily withheld for more than fifteen months after adjudication and until the expiration of the period allowed for proving claims, should be treated as a "provable debt" under section 17, so as to be barred by the bankrupt's discharge and entitling the bankrupt to a stay on a pending suit thereon in the state court under section 11. In my judgment, it should be so treated."

The error of the argument of the counsel for the appellant lies in his failure to distinguish between the terms "provable claim," "proof of claim" and "allowance of claim." There is a clear distinction running through the entire Bankruptcy Act, and though the terms are sometimes used interchangeably, the distinction in meaning is always apparent. It is pointed out in *In re Hornstein*, 10 Am. Bkr. Rep. 308, at pages 317-321.

A provable claim is any claim within the classes specified in section 63a, liquidated or unliquidated, secured or unsecured.

A proof of claim is a deposition in a certain form showing the grounds of the claim, the amount thereof and containing certain other information in regard thereto. The act of proving a claim consists in verifying the proof of claim and filing it with the referee.

The allowance of a claim is the judicial determination of the validity and amount of a claim which has been proved.

In other words, a claim for unliquidated damages is a provable claim, although the creditor may not until the damages have been

liquidated as directed by the Bankruptcy Court, either make a deposition as to its amount or procure its allowance.

The theory of the Bankruptcy Law is, that all creditors shall share alike in the distribution of the assets. The only method of proceeding to such distribution is to ascertain the creditors and the amount due to each. Right here the law wisely says that a man who has received a preference shall not be considered a creditor unless he restore to the assets what he has received by way of preference. Any other rule would give to such preferred creditor a distinct advantage over others which violates the very spirit of the Act. Also for the same reason a mere endorser upon a promissory note of the bankrupt is not a creditor until his liability becomes fixed, as held in Phillips vs. Dreher Shoe Co., 7 Am. Bankruptcy Reports, 326, cited on the brief of the appellant.

Section 636 provides that *unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct.* If a man were insolvent and had committed an act of bankruptcy and all his creditors had just and valid claims, but unliquidated, upon the theory of the learned counsel for the appellant the court would be powerless to proceed under section 63b to direct liquidation, and after such liquidation to adjudicate him a bankrupt. We submit that no reasonable construction of the act of 1898 would permit such manifest injustice. If the act gives to the court jurisdiction to liquidate the claim it must necessarily acquire jurisdiction by a petition and subpoena, and having thus liquidated the claim, it follows as part of the initial proceedings that an adjudication will follow, of course, if the man be both insolvent and has committed an act in bankruptcy.

The judgment appealed from should be affirmed, with costs.

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